Trial Tactics

I. Teaching the Rules of Evidence Through Objections

A trial lawyer's role is to persuade. A jury trial presents the lawyer with numerous opportunities to persuade, not only of the justness of his client's position but, more fundamentally, of his credibility and suitability to serve as the jury's guide in considering the evidence and ultimately reaching its decision. Lawyers are generally more cognizant of these opportunities during their own presentation of evidence. However, a lawyer's objections to the other side's evidence offers another opportunity to persuade that should not be neglected.

And yet it often is. If there is one thing lawyers are consistently told when setting off for their first jury trial, it is not to object too much. This advice begs the question of how much is too much. It may be more than you would think. The common perception among trial lawyers is that objecting to the other side's evidence is not persuasive, that it will only make the lawyer look like he is obstructive or hiding the truth, and, if anything, that the objection will merely draw more attention to the offending evidence. There is a risk of all of these impacts in making objections. Nevertheless, there is something to be said for objecting early and often in a jury trial, not only to preserve error (although it certainly beats *not* objecting as a means of preserving error) but also to persuade. The key to this is to make sure the jury understands what the objection is and why it *should* be sustained, even if it isn't.

A. Laying The Groundwork

First, you have to lay the groundwork. Every juror should be made to understand that a trial of disputed fact issues cannot be a free-for-all of testimony and evidence offered by the parties. The jury's primary concerns typically is how long the trial will last. A trial unlimited in the scope of evidence and unrestricted in the types of evidence that will be admitted obviously has the potential to take much more time than one that is more limited in scope. This is a concept that should be introduced to the jury at the first opportunity, in jury selection. Once the jury understands this concept, the lawyer can cast himself or herself, through objections to the evidence, in the role of the protector of the jury's time, making sure that the jury's time isn't wasted hearing improper evidence and that the trial doesn't take more time than necessary to reach a fair resolution of the fact issues in dispute. Efficiency is not a substitute for justice; it is, however, easier to recognize and often just as appreciated by jurors who may be paid as little as $6.00 a day for their time and service on the jury.

B. Three Objections For Every Trial

There are three objections that you should be prepared to raise in every trial to demonstrate how your opponent's evidence, or his approach to the evidence, lacks credibility: relevance, hearsay, and "asked and answered." In every jury trial, jurors are instructed that they are the sole judges of the credibility of the witnesses and the weight to be given their testimony. This is a powerful instruction, and it places a clear obligation on the lawyers to present credible evidence. It also affords the lawyers an opportunity to show how the other side is failing to meet this obligation, through their objections. You have to know the Rules of Evidence. If you don't know the Rules of Evidence, you can't use objections to persuade. In fact, you're probably

better off following the advice about not objecting. But if you know the Rules of Evidence and understand the policies underlying them, you can use these objections to not only control the evidence of the trial but also to persuade the jury about your credibility and your opponent's lack of credibility.

(1) The Relevance Objection

The purpose of the relevance objection is to keep the evidence, and therefore the trial, focused only on those issues that are in dispute and that the jury is going to be asked to resolve. This is something the jury is very interested in. Therefore, with this underlying goal always in mind, relevance objections should always indicate how the evidence exceeds this salutary purpose. For example, objecting that "the jury is not going to be asked about X; it's not relevant" or that "this evidence doesn't make Y any more or less likely, it's not relevant" reminds the jury that the evidence presented by the parties is supposed to be going towards helping them resolve a disputed fact issue and that they are going to need relevant information on which to base their decision. Through your objections, you are training the jury how to listen and consider evidence. Even if your objection is overruled and the evidence admitted, the more likely result under the permissive standard for relevant evidence, the opposing lawyer has to show how it relates to what the jury is going to be asked. If he cannot meet this burden, the offer of this evidence will impact his own credibility in the eyes of the jury.

(2) The Hearsay Objection

The hearsay objection serves a different purpose, to make sure evidence is sufficiently reliable to be considered in a trial. It is too much to expect that a jury will understand all of the nuances of and exceptions to the hearsay exclusion, and the lawyer should not even attempt this exercise. Instead, the lawyer should raise the hearsay objection to point out evidence that does not have some of the typical indications of reliability that the jury will have seen through other evidence in the trial. For example, objecting to a witness's relation of his conversation with a third party that the third party "was not under oath when the statements were made and is not here for me to cross-examine" highlights both the importance of the oath taken by every witness the jury has seen in the case and the effectiveness of cross-examination as a "crucible of truth." Once again, the lawyer is training the jury. A jury can understand that evidence that is under oath and that can withstand cross-examination is more credible than evidence that has not or cannot. With appropriate tutoring from the lawyer, a jury can be persuaded to expect the former, discount the latter, and respect the lawyer who taught them the difference.

A huge exception to the hearsay exclusion is Rule 703 of the Rules of Evidence, which allows an expert to disclose underlying data supporting his opinions, even if this data would otherwise be inadmissible, if of a type reasonably relied upon by experts in the particular field and if the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. Because this information is not admitted for its truth but only as a basis for the expert's opinion, it is technically non-hearsay, and out-of-court statements relied on by the expert in forming his opinions are frequently admitted under this rule. The distinction between statements offered for the truth of the matter asserted and statements offered to show the basis for an expert's opinion is often too subtle for a jury to discern, particularly when one would assume that an expert would not rely on a statement if it

wasn't true. Until argument, hearsay objections offer the lawyer's only opportunity to highlight this distinction. The objection can be very effective, particularly if the opposing side counters with the stock response that the out-of-court statements are not offered for the truth of the matters asserted. This is an incredible thing for a jury to hear from a lawyer who is offering evidence. The reaction you can expect is that, if evidence isn't offered for its truth, then the jury doesn't want to hear about it. A limiting instruction from the judge to this effect can be almost as helpful in this respect. Either way, the lawyer's objection has laid the groundwork for an effective argument as to what credible evidence looks like and what it does not look like.

(3) Asked and Answered

Finally, the objection that a question propounded has been "asked and answered" is a recognition that there are limits to the proceedings and that they cannot be prolonged indefinitely through repetition of the perceived high points of a party's case. This is an objection that the lawyer should hold back, even though questions have previously been asked, until he gets a definite sense of the jury's impatience with the repetitious nature of the proceedings. When you combine this impatience with your opponent's repetition of a matter that has been covered extensively, the well-timed objection of "asked and answered" sets up another good argument regarding your opponent's credibility and his approach to the evidence. Once again, it doesn't matter if the objection is sustained or not. A jury has six to twelve sets of ears and is very sensitive to repetition. By objecting, the lawyer shows that he is paying attention like they are and that he wants the case to move forward. Repeating evidence, presumably for the purpose of highlighting its importance, is condescending to the jury. It also shows a lack of respect for a lawyer to expect jurors to pay attention to the evidence that has been admitted when he can't be bothered to do the same. Repeating evidence also lacks credibility. In the mind of the jury, a credible lawyer, having made one point, would make another one if he had one. Only if he didn't have another one would he resort to repeating one already made. Jurors will tend to believe the lawyer who thinks about the trial the way that they do. The lawyer who avoids repetition in his evidence and seeks to police it from his opponent's evidence, through objections, is thinking the way the jury is about the evidence and the trial.

In making objections, the lawyer should always remember his audience. While objections to preserve error are made to the judge, they are made for the court of appeals. Persuasive objections are also made <u>to</u> the judge, but they are made <u>for</u> the jury. The goal of a persuasive objection should be accomplished by making the objection and not by it being sustained. If you need a persuasive objection to be sustained for it to have the intended effect, you are placing the key to your success in someone else's hands. Sometimes this cannot be avoided, but you should ask yourself why you would be willing to do this when you don't have to. Objection by objection, you can teach the jury the purposes and policies of the Rules of Evidence, how they are designed towards trials that are limited to the issues in dispute and that are decided on the credible evidence, how your presentation of the evidence is consistent with these polices and purposes, and how your opponent's is not. Contrary to popular wisdom, people like to learn, even if they didn't like school. By teaching the jury the Rules of Evidence, you can build a credibility account that to draw on later in convincing the jury that you, and not your opponent, are the more trustworthy guide for the jury to follow in sorting through the evidence to reach a decision in the case.

II. The Importance of Good Exhibits

In trial, a lawyer's efforts for his client are directed at demonstrating either the truth of his position or the falsity of his opponent's position. In short, what the lawyer does is argument. From choice of clothing to closing remarks, the lawyer is constantly presented with opportunities for argument. The arguments a lawyer makes, or fails to make, can mean the difference between victory and defeat for his client.

In most aspects of a trial, experience gives seasoned lawyers a distinct advantage over younger lawyers in recognizing when to make arguments, what arguments to make, and how to make them effectively. An important area in a trial where the field can be leveled, however, is in the exhibits. In a sense, exhibits have the advantage over the parties, the witnesses, and the lawyers. A good exhibit can make its argument after the witnesses have been excused, the evidence has been closed, the lawyers have made their closing remarks, and the jury has retired. And yet, many exhibits, whether prepared by experienced or inexperienced trial lawyers, do not. Instead, the exhibits are forgotten the minute they are out of the jury's view, and with good reason: they are forgettable. The result is a wasted opportunity for argument.

A good exhibit is argument. Irrespective of experience level or number of trials, the lawyer's job is the same: to win his client's case. Documents from the case, together with testimony from the witnesses, are the columns across which the lawyer drapes his arguments. These columns do not come ready-made for the jury's digestion: the jury often needs help to understand how the facts support the client's position. If the facts established in a case are dots on a page, the lawyer's role and responsibility is to connect these dots, with argument. A good exhibit is one of the ways a lawyer can do this. While a document from the case can establish a fact, a good exhibit can give context to a seemingly innocuous fact, show how one fact relates to another, or prove a pattern from seemingly ambivalent facts. But it cannot do anything without input from the lawyer.

There are three main criteria to consider in putting together a good exhibit. First, it must be admissible. Second, it should be limited to a single, important point. Third, it must be simple. A stranger to the facts of the case should not only be able to understand it but also use the exhibit to convince others.

A. Admissibility

1. Relevant, But Not Too Relevant

An exhibit can't do anything if it isn't admitted into evidence. To be admitted, a good exhibit must be relevant evidence: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. A good exhibit should not be subject to a valid relevance objection. If it is, it violates one or both of the other criteria for a good exhibit by making more than one point or presenting too much information.

The real danger lies in putting together an exhibit that is *too* relevant. While the goal is argument, the temptation to be argumentative must be resisted. It is far more persuasive to show the jury where they should go than to push them or pull them where you want them to go.

Certain personality types will resist the push-or-pull type of advocacy by nature. Others that recognize it will resent it. A good exhibit is not an attempt to push the jury where you want them to go; it is an opportunity to show them where they should want to go. More importantly, assuming they want to go to a just verdict, it is an opportunity to show them who they can trust to lead them there.

An argumentative exhibit in this context is counterproductive. The importance of avoiding presenting an argumentative exhibit is not to eliminate possible objection from opposing counsel. An argumentative exhibit reduces the lawyer's credibility and should be avoided whether counsel objects or not. An experienced lawyer may not object to the other side's argumentative exhibits, instead letting the jury see just how hard the other side needs to push or pull the facts for its side to win. Exhibits that attempt to characterize the facts, rather than state them, or that contain "persuasive" modifying language erode the lawyer's credibility and are vulnerable to an argumentative objection.

2. Avoiding Too Much Of A Good Thing

With a good exhibit, the only objection should be that it is cumulative. The good exhibit seeks to summarize or encapsulate a set of facts that will be contained in or established through other documents or testimony. Thus, if these other documents or testimony are already in evidence, the good exhibit is, technically, cumulative of the other evidence. This is an objection that tends to be sustained more and more as the trial continues, particularly if the prejudicial (but not unfairly prejudicial) effect of the exhibits becomes clear to the judge. In the worst-case scenario, these exhibits should be admitted for demonstrative purposes, to assist the witness in presenting his testimony and the jury in understanding it. However, this does not do much for the lawyer once the case has been submitted to the jury and the exhibit does not make it back to the jury room. For this reason, the lawyer needs to try to overcome the cumulative objection whenever possible.

One approach to overcoming this objection is to introduce the exhibit into evidence before the underlying document or testimony. If the other evidence has not been admitted, then the exhibit cannot be cumulative of it. For documents, this requires a two-step authentication process: step one authenticates the underlying document; step two authenticates the exhibit as a true and correct excerpt from the document. The difference from the normal sequence of events is that the underlying document is not offered into evidence, at least not until after the exhibit is admitted. The rule of optional completeness will allow the other side to introduce the underlying document if the offering party does not.

This process is simpler if the underlying evidence is testimony. Instead of eliciting the testimony and asking if the exhibit summarizes the testimony, the witness should first testify to whether the exhibit is a fair and accurate summary of the testimony in issue. The exhibit is then offered into evidence before the testimony.

Of course, the lawyer should always be prepared to proceed with the exhibit as a demonstrative aid if an objection to its admissibility is sustained. The majority of people learn visually, and combining visual and auditory presentations of materials results in a much greater retention rate of the information presented. Even if the exhibit is not admitted into evidence, if it

enables the jury to have a clearer understanding of the witness's testimony, it has increased the effectiveness of the presentation of evidence and, accordingly, the lawyer's credibility.

B. Making Your Point

The exhibit should focus on one important point. Even in a simple car wreck case, jurors are bombarded with more information than they can reasonably be expected to keep up with. They are looking to the lawyers for cues as to what is important, what it is that they should really focus on. If possible, the lawyer should try to reduce the case to 3 to 5 important points. This may not be possible for a complex case. Whether the case has 3 important points or 20, however, each important point should have the benefit of a good exhibit driving its message home to the jury.

This brings up two issues: the number of points to make in a trial and the selection of those points. The lawyer must be cognizant of the fact that each additional point made dilutes the importance and effect of other points. The lawyer therefore must choose the points to focus on carefully. A less-is-more approach can be very beneficial in this process. One technique is to try to explain, in three sentences or less, why your client should win. The points made in these sentences should be the cornerstones of the main points of the case and, therefore, the exhibits. In addition to limiting the number of points, the selection of the points to be emphasized is critical to the effectiveness of the exhibits. If a jury concludes that a point emphasized by an exhibit is not important, future points that may be very important will be tuned out. There is a white-noise effect: emphasizing everything has a similar effect to a presentation that emphasizes nothing. The jury is left without a guide to the issues that are important to a resolution of the case. This is unacceptable.

Sometimes, the hardest part of a case is deselecting evidence that, despite its relevance, should not be included in the trial presentation. The importance of this cannot be overstated. While experience is an advantage in this process, preparation can make up the experience gap when it comes to exhibits. Accordingly, the lawyer should work and rework the important points of the case, and the exhibits to reflect these points, until each resonates on logical, emotional, and moral levels.

C. Keeping It Simple

The effectiveness of an exhibit is lost if it is too complicated to be understood. The lawyer should strive for a level of simplicity that ensures not only that the jury will understand it but also that one or more sympathetic jurors can use it to explain the lawyer's case at a time, after the jury has retired, when the lawyer no longer can. When a juror does not understand a lawyer's case, the juror is not likely to attribute this failing to his own inadequacies. Keeping the exhibits simple shows the jury that the lawyer's case does not depend on a confusion of the issues or attempts to mislead it. This also reduces the chance for an objection and, in the event of an objection, of it being sustained.

D. What is the Point?

The point of a good exhibit is to present a clear, coherent, and reliable argument of the lawyer's version of a set of facts. More fundamentally, the point is to demonstrate the lawyer's

credibility. Credibility is a lawyer's most powerful argument. On a certain level, it is the lawyer's credibility that is on trial, particularly in complex cases, where the myriad of facts may require jurors to rely on someone to guide them. It should go without saying that you want to be that guide. The lawyer must constantly be looking for opportunities to show jurors that he can be trusted to get it right.

This exercise is not without risk. An exhibit is an indication to the jury of the kind of path you will lead them down if they choose to follow you. You can help your credibility through your exhibits, but you can also hurt it. If an exhibit's characterization of the facts is unfair or inaccurate or even unclear, this damages your credibility the same as any unfair argument would. It is, however, a risk worth taking. There is no more consistent way to ensure success in jury trials than by gaining the jury's trust. This should be the goal of every trial lawyer, and the way to get there is to establish one's credibility. Experience may indicate credibility, but it is not determinative, and all lawyers should be looking for every opportunity to show that they are worthy of the jury's trust. The ability to put together an exhibit that makes your point without overstating your case will go a long way to showing the jury that, irrespective of experience, you can be trusted to guide them to where they want to go: a just result.

III. Expert Witnesses and the Unidentified, Out-of-Court Declarant

Lawyers and experts are more than familiar with the wide latitude afforded to experts to offer opinions, including those that are not based on firsthand knowledge or observation, so long as the facts or data are of a type reasonably relied upon by experts in the field of testimony. This relaxation of the usual requirement of firsthand knowledge, however, was premised on an assumption that the expert's opinion would have a reliable basis. As the Supreme Court has noted, and numerous courts and commentators have discussed, the Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony . . . rests on a reliable foundation." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2799 (U.S. 1993). This is the trial court's duty as "gatekeeper," and many of a trial court's most critical rulings in a trial arise out of the exercise of this duty.

Hearsay is among the most common types of otherwise inadmissible data admitted into evidence as "reasonably relied upon by experts" under Rule 703 of the Rules of Evidence. "Hearsay" is defined in the Rules:

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

TEX. R. EVID. 801(d). Permitting reliance on hearsay has allowed experts of numerous disciplines to testify to transactions, incidents, accidents, and other events to which they were not a party and that they never personally observed. While there is no doubt that experts in most, if not all, fields customarily rely upon hearsay in forming their opinions, whether this reliance is reasonable must be assessed by the trial court on a case-by-case basis. Under *Daubert* and its progeny, if the reliance is not reasonable, the opinion may not be admitted.

In assessing the reasonableness of an expert's reliance on hearsay, it is important to consider the reasons these statements are deemed to be sufficiently reliable as to form the basis for an expert's opinion. It is clear that the customary reliance by experts in the particular field alone cannot be sufficient to carry this burden; otherwise, the trial court would be left with little basis to contradict an expert's bare assertion that the data meets the Rule 703 standard. Something more is required. The answer may be found in the residual exception to the hearsay rule found in Rule 807 of the Federal Rules of Evidence. FED. R. EVID. 807. Under Rule 807, an out-of-court statement not covered by Rules 803 or 804 may nevertheless be admissible if there are equivalent circumstantial guarantees of trustworthiness. FED. R. EVID. 807. This exception is viewed by many as a last refuge, and indeed it would be risky to place too much reliance on evidence that requires application of Rule 807 for admission. Nevertheless, the last sentence of Rule 807 is instructive on the question of why experts may be permitted to rely on and present evidence that is hearsay:

> However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing *to provide the adverse party with a fair opportunity to meet it*, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 807 (emphasis added). It is the "fair opportunity" afforded to the adverse party to meet this evidence that makes it reasonable to permit experts to rely on hearsay statements in forming their opinions. If the statement is not true or not reliable, the adverse party can demonstrate the problems with the expert's reliance on the hearsay, presumably to the detriment of the weight of the expert's opinion. The credibility of the out-of-court declarant may be attacked, and the party against whom a hearsay statement has been admitted may call the declarant as a witness and examine the declarant on the statement as if under cross-examination. *See* FED. R. EVID. 806; TEX. R. EVID. 806

Under Rule 807, the "fair opportunity" to meet hearsay evidence includes providing the name and address of the declarant. FED. R. EVID. 807. While this rule does not govern the admission of expert testimony under Rule 702 or 703, it is clear that the reasonableness of one's reliance on an out-of-court statement would differ greatly between statements attributable to a known declarant versus an unknown declarant. The procedural rules support this concept. In particular, the Rules of Civil Procedure mandates disclosure of the name, address, and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses. *See* FED. R. CIV. P. 26(a)(1)(A); TEX. R. CIV. P. 194.2(e). The lawyer will have a difficult time reconciling the position that his expert's reliance on the out-of-court statement of a person was reasonable with the position that the same person was not required to be disclosed as having discoverable information. Each of these persons necessarily possessed knowledge of discoverable information. The ability to discover the facts known to these persons is critical to the party opposing the expert's testimony. If the persons upon whom the expert relied are wrong, so too are the opinions of the expert. And yet parties routinely fail to disclose the identity of persons on whom their experts rely. This fails to satisfy the party's discovery obligations and effectively denies the opposing party the opportunity to conduct discovery of these persons prior to trial. This directly prejudices the opposing party's ability to prepare for trial.

The Rules of Civil Procedure provides for the exclusion of any witness or information not so disclosed. *See* FED. R. CIV. P. 37(c)(1); TEX. R. CIV. P. 193.6(a). The salutary purpose of this rule is to require complete responses to discovery so as to promote responsible assessment of settlement and prevent trial by ambush. The language of the rule is mandatory, and its sole sanction—exclusion of evidence—is automatic. Courts have recognized that it is not in the interest of justice to apply the rules of procedure unevenly or inconsistently. Instead, it is both reasonable and just that a party expect that the rules he has attempted to comply with will be enforced equally against his adversary. Furthermore, a party has no duty to remind another to abide by the Rules of Civil Procedure.

The only question remaining for the trial court may be whether to exclude the entirety of the expert's opinion or just the statement by the unidentified, out-of-court declarant on which this opinion was based. This presents a difficult decision for the trial court and an unpalatable position for the expert witness, the lawyer, and his client. Certainly, no one should be surprised by a trial court's determination in its gatekeeper role that a statement by an unidentified, out-of-court declarant is an insufficiently reliable foundation for an expert's opinion under the requirements of *Daubert* and its progeny.

Depending on when the issue arises, a continuance may be viewed as a less harsh solution. However, if granting a continuance becomes a trial court's routine reaction to the problem presented by a party's failure to disclose the identity of these witnesses, not only will parties have no incentive to comply with their discovery obligations in this respect, they will be rewarded for not complying. If the opposing party does not raise the objection, the offering lawyer will have successfully shielded his expert from a potentially devastating critique of his expert's opinion. If the party raises the objection and the trial court grants the offering party a continuance to meet its discovery obligations, the only penalty is having to comply with the rules as it should have done in the first place. This is a free bite at the apple and not a deterrent to improper conduct. Clearly, a continuance is not an acceptable solution for a court's long-term administration of justice.

Trial courts must be expected to be firm both in their enforcement of the Rules of Civil Procedure and in their role as gatekeeper to ensure that an expert's testimony rests on a reliable foundation. The expert's obligation is to form relevant opinions based on a reliable foundation. Experts are often unaware of the obligations imposed on their testimony by the evidentiary and procedural rules. It is the lawyer's responsibility to ensure that the expert is permitted to offer his opinions under these rules. To avoid the trap of the unidentified, out-of-court declarant, the trial lawyer must be diligent in working with his expert to identify those persons on whom the expert has relied and in the timely disclosure of these persons in discovery.